

**STATE OF HAWAII**  
**DEPARTMENT OF LAND AND NATURAL RESOURCES**  
**OFFICE OF CONSERVATION AND COASTAL LANDS**  
Honolulu, Hawaii

REF:OCCL:DH

Contested Cases KA-07-05

March 9, 2007

**Board of Land and  
Natural Resources  
State of Hawaii  
Honolulu, Hawaii**

**REGARDING:** Appointment and Selection of a Hearing Officer to Conduct All Hearings for One (1) Contested Case Hearing

**SUBJECT PETITONS:** Docket No. KA-07-05  
In the matter of a Contested Case Petition Regarding Enforcement Case KA-06-72 Regarding the Unauthorized Construction of a Chain Link Fence Located Within the Conservation District, Subject Parcel TMK: (4) 5-8-009:025, Wainiha, Hanalei, Island of Kauai

**BACKGROUND:**

On January 12, 2007, the Board of Land and Natural Resources' (BLNR) heard Enforcement Case KA-06-72 regarding the unauthorized construction of a chain link fence, located within the Conservation District, Subject Parcel TMK: (4) 5-8-009:025, Wainiha, Hanalei, Island of Kauai. During the land board meeting, a oral request was made for a Contested Case.

On January 22, 2007, the Office of Conservation and Coastal Lands (OCCL) received a petition from Michael C. Carroll, counsel to the landowner and Caren Diamond (Exhibit 1).

**AUTHORITY FOR DESIGNATING HEARING OFFICERS:**

Hawaii Administrative Rules (HAR), Section 13-1-32 (d) provides that the Board may conduct the Contested Case Hearing, or at its discretion, may appoint a hearing officer to conduct the hearing. HAR, Section 13-1-29 (a) provides that, "the time for making an oral or written request and submitting a written petition may be waived by the Board."

Additionally, Hawaii Revised Statutes (HRS), Sections 92-16 and 171-6 also provide that the Board may delegate to the Chairperson the authority to select the Hearing Officer to conduct a Contested Case Hearing.

## **BASIS FOR DESIGNATING HEARING OFFICERS:**

Conducting a Contested Case Hearing may involve: giving notice of hearings, administering oaths, compelling attendance of witnesses and the production of documentary evidence, examining witnesses, certifying acts, issuing subpoenas, making rules, receiving evidence, holding conferences and hearings, fixing filing deadlines, and disposing of other matters that may arise during the orderly and just conduct of a hearing. History suggests that designating a Hearing Officer to perform these actions may provide a more expeditious resolution of the case than having the full Board conduct the hearing.

## **DISCUSSION:**

Staff notes HAR, Section 13-1-31 (3) notes, "all persons who have some property interest in the land, who lawfully reside on the land, who are adjacent property owners, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application." Staff notes the petitioner notes that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public.

Staff notes the landowner's attorney made an oral request for a contested case hearing by the close of the Board meeting at which the matter was scheduled for disposition, as required under HAR, Section 13-1-29 (a). Staff notes the petitioner did file a written petition with the Board within the required time frame of not more than ten days after the close of the Board meeting.

Staff notes that, by designating a Hearing Officer to conduct the hearing, the Board does not relinquish its authority to ultimately decide on the matters being contested. As indicated above, the determinations of standing have not yet been made. Staff believes that the preliminary hearing on standing should also be conducted by the Hearing Officer rather, than the full Board. After the Hearing Officer conducts the preliminary hearing on standing, the Board would still retain its discretion in issuing Orders on this matter of standing. Further, should standing be granted, at the conclusion of the case, the Board would act with its own discretion on the Hearing Officer's Finding of Fact, Conclusion of Law, and Decision and Order.

Staff therefore recommends,

## **RECOMMENDATION:**

- 1) That the Board authorize the appointment of a Hearing Officer for Contested Case KA-07-05, and let the Hearing Officer conduct all the hearings relevant to the subject petition for a Contested case Hearing, and

- 2) That the Board delegate the authority for selection of the Hearing Officer to the Chairperson.

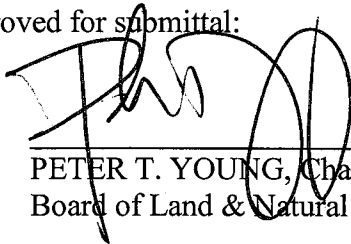
Respectfully submitted,

*Dawn T. Hegger*

Dawn T. Hegger  
Staff Planner

Approved for submittal:

By:



PETER T. YOUNG, Chairperson  
Board of Land & Natural Resources

## BOARD OF LAND AND NATURAL RESOURCES

## PETITION FOR A CONTESTED CASE HEARING

1. Name Caren Diamond, see p. 2 Phone 826-5150 Fax 826-5150
2. Address P.O. Box 536 Hanalei, HI 96714  
 Email Address KaimanCD22@yahoo.com
3. Attorney (if any) not at this time Phone \_\_\_\_\_
4. Address ~  
 Email Address ~
5. Subject Matter: Conservation District Enforcement File No 06-72
6. Date of Public Hearing/Board Meeting January 12, 2007
7. Legal authority under which hearing, proceeding or action is being made Sect. 13-1-29 as stated + written at the Jan. 12, 2007 meeting
8. Nature of your specific legal interest in the above matter, including tax map key of property affected: 5-8-009: 025 see p. 3
9. The specific disagreement, denial or grievance with the above matter: see p. 4
10. Outline of specific issues to be raised: shoreline, access, county, encroachments, vegetation, irrigation
11. Outline of basic facts: illegal fence constructed seaward of the shoreline. Landowner + attorney's deferred action + want to grow in a naupaka hedge before they  
 cont. - p. 4
12. The relief or remedy to which you seek or deem yourself entitled: immediate removal of fence (ie) No tolerance Policy of State + County

(If there is not sufficient space to fully answer any of the items above, use additional sheets of paper.)

The above-named person hereby requests and petitions the Board of Land and Natural Resources for a Contested Case hearing in the matter described above. Dated: 1/19/07

EXHIBIT 1

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1. Beau Blair , Barbara Robeson
2. PO Box 429 Hanalei, Hi. 96714  
Tmk 5-8-9:10  
Beausephene (2) hawaii.rr.com

P.O. Box 369

Hanalei Hi. 96714

robersonboo1@hawaii.rr.com

5. Regarding alleged Unauthorized construction of chain link fence within the Conservation District located makai of 7380 Alealea Rd, Wainiha,

8. Caren Diamond lives in very close proximity to this unauthorized fence. I actively use this beach for sunrises, sunsets, swimming, recreational + spiritual renewal, + aesthetic enjoyment. I have a definite interest in the restoration of access + this sand beach resource and have actively sought to defend these interests in the shoreline area of Wainiha. I have documented this area for over 8 years + have enjoyed this fenced area for over 27 years.

Beau Blair, lives on Kuhio Hwy directly mauka of the subject property. For over 30 years, she + her family have used the beach + shoreline area, including the fenced portion, for active recreation and the quiet enjoyment of public trust resources. Documentation of this area for over 8 years in addition.

Barbara Robeson, uses this beach for a multitude of uses such as walking, swimming, spiritual renewal + quiet enjoyment + has for over 30 years.

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# 9 This follows our verbal + written comments on January 12, 2007. This is a request to intervene as neighboring interested parties in the contested case requested by Mr. Bernard Bays for the Londonees. We ask to participate and are in support of the landboard + staff in the efforts to remove this coastal hazard.

# 11 will remove hazardous fence. Beach loss, access diminished, trees removed, illegal plantings, no valid shoreline, safety issues

Mahalo -

Caren Uamnel

~~Barbara~~

Barbara Robeson

Of Counsel:

BAYS, DEEVER, LUNG,  
ROSE & BABA

A. BERNARD BAYS 969-0

Attorney At Law

A Law Corporation

MICHAEL CARROLL 7583-0

Alii Place, 16th Floor

1099 Alakea Street

Honolulu, Hawaii 96813

Telephone: (808) 523-9000

Attorneys for Petitioner

David Smith

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OFFICE OF CONSERVATION  
AND COASTAL LANDS

2007 JAN 22 A 10: 46

DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

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DEPARTMENT OF LAND AND NATURAL RESOURCES  
OFFICE OF CONSERVATION AND COASTAL LANDS  
Honolulu, Hawaii

Board of Land and Natural Resources  
Honolulu, Hawaii  
State of Hawaii

REGARDING: Conservation District Enforcement File No. KA 06-72  
Regarding Alleged Unauthorized Construction of Chain Link  
Fence Within the Conservation District

BY: Uli Mahina LLC  
David Smith

TMK: (4) 5-8-009:025

AREA OF USE: Approximately 124.5 Linear Feet

AREA OF PARCEL: 27,674 square feet

LOCATION: Makai of 7380 Alealea Road  
Wainiha, Hanalei, Kauai

SUBZONE: Resource



PETITION FOR CONTESTED CASE HEARING

1.   Name:                   David Smith  
    Phone:                c/o Bays, Deaver, Lung, Rose & Baba: 523-9000  
    Fax:                   c/o Bays, Deaver, Lung, Rose & Baba: 533-4184
  
2.   Address:             c/o: Bays, Deaver, Lung, Rose & Baba  
                            1099 Alakea Street, 16<sup>th</sup> Floor  
                            Honolulu, HI 96813  
    Email Address:        mcarroll@legalhawaii.com
  
- 3:   Attorneys:          A. Bernard Bays  
                            Michael C. Carroll  
                            Bays, Deaver, Lung, Rose & Baba  
    Phone:                523-9000  
    Fax:                   533-4184
  
4.   Address:             Bays, Deaver, Lung, Rose & Baba  
                            1099 Alakea Street, 16<sup>th</sup> Floor  
                            Honolulu, HI 96813  
    Email Address:        mcarroll@legalhawaii.com
  
5.   Subject Matter:      Alleged unauthorized construction of a chain link fence  
                            within the Conservation District located at 7380 Alealea Road,  
                            Wainiha, Hanalei, Kauai, TMK: (4) 5-8-009:025.
  
6.   Date of Public Hearing/Board Meeting:  
  
                            January 12, 2007
  
7.   Legal authority under which hearing, proceeding or action is being made:  
  
                            Hawaii Revised Statutes Chapters 91,183C, and 205A,Hawaii  
                            Administrative Rules, Title 13, Subtitles 1 & 5.
  
8.   Nature of your specific legal interest in the above matter, including tax map key of  
    property affected:  
  
                            David Smith is the owner of the subject property located at 7380  
                            Alealea Road, Wainiha, Hanalei, Kauai, TMK: (4) 5-8-009:025,  
                            and is the respondent in the above referenced alleged violation  
                            matter, ENF: KA 06-72.
  
9.   The specific disagreement, denial, or grievance with the above matter:

David Smith disagrees with and denies the Board of Land and Natural Resources ruling at the Board of Land and Natural Resources, Land Board hearing conducted on January 12, 2007.

10. Outline of specific issues to be raised:

- A. Whether the Department of Land and Natural Resources or the County of Kauai has jurisdiction over the subject matter of the alleged violation.
- B. Whether the construction of the chain link fence constitutes an unauthorized land use.
- C. Whether the Board of Land and Natural Resources erred in denying David Smith's request to dismiss the alleged violations.
- D. Whether the Board of Land and Natural Resources erred in denying David Smith's request for a temporary variance.

11. Outline of basic facts:

This case arises out of the construction of a chain-link fence that was made necessary as a temporary measure to protect Mr. Smith's property, and the safety, security, and privacy of tenants and guests to Mr. Smith's property, located at 7380 Alealea Road, Wainiha, Hanalei, Kauai, TMK; (4) 5-8-009:025 (the "Property"). Prior to constructing the fence, Mr. Smith's Property was exposed to repeated incidence of trespassing, vandalism, theft, threats of violence, and dangerous activities that required immediate preventive measures. Additionally, the deliberate, illegal, and unauthorized removal of the natural shoreline vegetation prevented the natural vegetation to grow in and protect the Property. Mr. Smith first attempted to install "no trespassing" signs, which were immediately torn down by trespassers. After being told by a police officer that the only way he could protect his property and the safety of his tenants and guests was to construct a fence, Mr. Smith constructed the fence as a last resort. The fence is only intended as a temporary measure to allow the vegetation to return to its natural state without the illegal interference of trespassers uprooting and killing the vegetation. The fence closely follows the last certified shoreline obtained for the Property on November 27, 2000, is mauka of both the fence on the adjoining property, and the dense vegetation on the other adjoining property. The fence in its current location is necessary as a temporary measure to protect the safety and security of the Property and there are no reasonable and prudent alternatives available that would promote the public interest as well as the proposed land use.

12. The relief or remedy to which you seek or deem yourself entitled:

Mr. Smith is entitled to a dismissal of the alleged violation and a temporary variance to allow the fence to remain for a limited period of time to allow the vegetation to return naturally without human intervention.

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The above-named person hereby requests and petitions the Board of Land and Natural Resources for a Contested Case Hearing in the matter described above.

DATED: Honolulu, Hawaii, January 22, 2007.

A handwritten signature in black ink, appearing to read "Michael C. Carroll", written over a horizontal line.

A. BERNARD BAYS  
MICHAEL C. CARROLL

Attorneys for Petitioner  
David Smith